IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 65 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

@

COMMISSIONER OF INCOME TAX

Versus

SAURASHTRA PACKAGING P LTD

Appearance:

1. INCOME TAX REFERENCE No. 65 of 1995

MR TANVISH U BHATT for Petitioner No. 1

NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 26/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

At the instance of the applicant- revenue, the following question of law is referred to this Court for its opinion for assessment years 1984-85 and 1985-86:-

"Whether, the Appellate Tribunal is right in law and on facts in holding that the amount of sales-tax refund received by the assessee firm was not to be included in the total income of the assessee under the provisions of sec.41(1) nor provisions of secs. 176(3A), 170 (1)(b) and 28(iv) are attracted ?"

2. In this case, the assessee- Company was one of the partners of M/s. Saurashtra Packaging Services and that firm stood dissolved w.e.f. 1-4-1983 and the business of the said firm was taken over as going concern by the assessee- Company w.e.f. 1-4-1983 itself in the accounting year relevant to assessment year 1984-85. The assessee received sales tax refund of Rs.33,303/- in assessment year 1984-85 and Rs.12,887/- as sales tax refund in the previous year relevant to assessment year 1985-86. The Assessing Officer included these two amounts in the total income of the assessee rejecting the contention of the assessee that the amounts of sales-tax received are not included in the total income of the assessee firm under the provisions of Section 41(1) of the Act nor under the provisions of Section 28 and Section 176(iiia) of the ACt. The ITO has applied Explanation I to Section 170 of the Act for treating the amounts of sales-tax refund as income of the assessee-Company and accordingly added the said refund to the total income of the assessee in the assessment year 1984-85 and 1985-86 respectively.

3. Being aggrieved of the said orders, the assessee had preferred an appeal before CIT (Appeals) and while disposing of the said appeals, the CIT (Appeals) has placed reliance on the decision of the Hon'ble Supreme Court in the case of Hukamchand Mohanlal (1991) 82 ITR 624 and held that the disputed amounts of sales-tax refund cannot be included in the income of the assessee under the provisions of Section 41(1) of the Act. The CIT (Appeals) has further placed reliance on the decision of Income-tax Appellate Tribunal Allahabad Bench, 'A' in the case of New Kanpur Flour Mills (P) Ltd. (1986) 19 ITD 363 and held that the provisions of Section 176 (3A), section 170(1)(b) and Section 28(iv) are not attracted.

4. Being aggrieved of the said order, the appeals were filed by the revenue before the Tribunal and

Tribunal after remand, has decided the said matter afresh and had taken the view that the amount of sales-tax refund received by the assessee- Company in assessment year 1984-85 and 1985-86 were not to be included in the total income of the assessee.

In the aforesaid premises, the revenue has come in Reference before this Court and sought the opinion of this Court on the above question.

5. Heard Mr Tanvish Bhatt, the learned Standing Counsel appearing for the applicant- revenue. Nobody appears on behalf of the respondent-assessee though notice was duly served.

6. Mr Bhatt has submitted that the amounts of sales-tax refund received by the assessee was to be included in the total income of the assessee in view of the provisions contained in Section 41(1) of the Act and the said amount was also to be included considering the provisions contained in Section 176(3A), 170(1)(b) as well as Section 28(iv) of the Act are concerned. The taxability of the amount in question is, therefore, required to be tested having regard to the provisions contained in the aforesaid sections.

7. As far as applicability of Section 41(1) is concerned, the CIT (Appeals) as well as the Tribunal have referred to the decision of the Hon'ble Supreme Court in the case of CIT vs. Hukumchand Mohanlal (1971) 82 ITR 624. It is observed in this decision by the Hon'ble Supreme Court that the Act did not contain any provision making a successor in business or the legal representative of an assessee to whom an allowance had already been granted, liable to tax under section 41(1) in respect of the amount remitted and received by the successor or the legal representative. Section 41 did not apply to this case because the assessee sought to be taxed was not the assessee contemplated by that section. The assessee within section 41(1), namely the husband, having died, the revenue could not take advantage of these provisions.

8. The above principle was also reiterated by the later decision of the Hon'ble Supreme Court in the case of Saraswati Industrial Syndicate Ltd. vs. CIT, (1990) 186 ITR 278 wherein it is held that, " in order to attract the provisions of section 41(1) of the Income-tax Act, 1961, the identity of the assessee in the earlier year in which deduction was granted in relation to a trading liability and in the subsequent year in which

benefit is derived must be the same. If there is change in the identity of the assessee, there would be no tax liability under section 41. If the assessee to whom the trading liability may have been allowed as a business expenditure in the earlier year ceases to be in existence or if the assessee has changed on account of the death of the earlier assessee, the benefit received in the subsequent year cannot be treated as income received by the assessee".

9. Since in the present case, the identity of the assessee is changed and the refund is received by the successor firm, the provisions contained in Section 41(1) are not applicable and the amount of sales-tax refund received by the assessee firm cannot be taxed by invoking the provisions of Section 41(1) of the Act.

10. As far as the applicability of Section 28(iv) is concerned, the issue is directly covered by the decision of this Court in the case of CIT vs. Alchemic Pvt. Ltd., (1981) 130 ITR 168 wherein it is held that if what is received either by way of benefit or perquisite is money, there is no question of considering the value of such monetary benefit or perquisite under clause (iv) of section 28 and including the value of such benefit or perquisite under the head "Profits and gains of business or profession". It is only if the benefit or perquisite is not in cash or money that section 28(iv) would apply and the question of including the value of such benefit or perquisite as income from business would ever arise.

Here, in the present case what was received by the assessee firm was the money and there was no question of considering the value of such monetary benefit or perquisite under clause (iv) of section 28 and hence there is no question of including the value of such benefit or perquisite under the head "Profits and gains of business or profession". The Revenue is, therefore, not justified in taxing the amounts in question by invoking the provisions of section 28(iv) of the Act.

11. As far as applicability of Section 176(3A) is concerned, a plain reading of the section itself makes it clear that the said section is not applicable to the facts of the present case. Section 176(3A) can be applied only when there was discontinuance of business. Here, in the present case, the business was continued even after the same was taken over by the assessee firm. In such a situation, the provisions of Section 176(3A) of the Act cannot be pressed into service. The Revenue is, therefore, not justified in invoking the provisions of

section 176(3A) of the Act for the purpose of including the amount of sales-tax refund in the taxable income of the assessee firm.

12. As far as Section 170 (1)(b) read with Explanation thereto is concerned, it has no application to the facts of the present case. With a view to examine this point, it is necessary to reproduce the said section. Section 170(1)(b) reads as under:-

"(1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded there is by any other person (hereinafter in this section referred to as the successor) who continues to carry on that business or profession, -

(a) ....

(b) the successor shall be assessed in respect of the previous year after the date of succession."

Explanation to Section 170(1) of the Act defines the word "income" which is used in that Section. It reads as under:-

"For the purposes of this section, "income" includes any gain accruing from the transfer, in any manner whatsoever, of the business or profession as a result of the succession."

13. Under the Indian Income-tax Act,1922, the corresponding provisions were contained in Section 26(2) of the said Act. However, it had a limited application. It applied to succession to a business, profession or vocation. Succession to any source of income other than business, profession or vocation did not come within the purview of Section 26(2) of the 1922 Act. It has been held by the Hon'ble Supreme Court in the case of CIT vs. Express News Papers Ltd. (1964) 53 ITR 250 that both section 26(2) and the proviso thereto dealt with any profits and gains of a business, profession or vocation; they did not provide for the assessment of income under any other head, e.g. capital gains. In an assessment made on the successor under the proviso to section 26(2), capital gains made by the predecessor could not be included, and therefore the amount which represented the capital gains of the predecessor on the sale of its machinery could not be brought to tax in the assessment of the successor under section 26(2) of the 1922 Act.

14. Section 170(1)(b) read with Explanation thereto made a departure from the provisions of Section 26(2) of the 1922 Act in this wise that by virtue of Explanation, the scope of the word "income" used in Section 170(1) of the Act was widened and "any gain accruing from the transfer" was also brought within the purview of taxable income of the successor. However, the amount of sales-tax refund received by the assessee firm cannot be said to be gain accruing from the transfer and hence it is not liable to be taxed in the assessment of the assessee firm, by virtue of Section 170(1)(b) read with Explanation thereto.

15. In view of the above settled legal position, we are of the view that amount in question cannot be included in the total income of the assessee either by invoking the provisions of Section 41(1) or by Section 176 (3A) or by Section 170(1)(b) or by Section 28(iv) of the Act.

We, therefore, answer the question referred to us in the affirmative i.e. in favour of the assessee and against the revenue.

16. The Reference is accordingly disposed of with no order as to costs.

(M.S. Shah,J) (K.A. Puj,J)

zgs/-